

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN L. RYAN and U.S. POSTAL SERVICE,  
POST OFFICE, Cincinnati, OH

*Docket No. 98-1819; Submitted on the Record;  
Issued September 12, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined the method of repayment for appellant's overpayment.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision and order<sup>1</sup> on December 9, 1993 in which it affirmed, in part, the Office's decision dated January 17, 1992 and finalized January 23, 1992 on the grounds that the Office properly determined that appellant forfeited his right to compensation in the amount of \$73,991.90 for the period September 11, 1985 through July 4, 1989 because he knowingly failed to report employment and/or earnings; that there was an overpayment of compensation in the amount of \$73,991.90; and that appellant was not "without fault" in the creation of the overpayment such that it was not subject to waiver. The Board set also aside the Office's decision dated January 17, 1992 and finalized January 23, 1992 with respect to the method of recovery of the overpayment.<sup>2</sup> The Office determined that it had improperly required payment of a lump sum and remanded the case to the Office for determination of a repayment schedule pursuant to the factors delineated in 20 C.F.R. § 10.321(a).<sup>3</sup> The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

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<sup>1</sup> Docket No. 92-1261.

<sup>2</sup> The Office had required appellant to repay the overpayment in a lump sum of \$15,000.00 in addition to withholding \$700.00 monthly from future compensation benefits.

<sup>3</sup> On April 16, 1963 appellant, then a 26-year-old mail carrier, sustained an employment-related back strain. The Office later accepted that appellant sustained an employment-related herniated disc at L4-5 and authorized a hemilaminectomy, disc excision and fusion at L4-5. He also has another appeal (Docket No. 98-443) before the Board. Appellant appealed a February 12, 1997 Office decision which upheld the Office's reduction of his compensation effective May 26, 1996 based on his capacity to earn wages as a part-time telemarketer.

By decision dated January 27, 1994, the Office determined that appellant's overpayment would be recovered by deducting \$700.00 every 4 weeks from his continuing compensation payments. By decision dated May 27, 1997, the Office denied modification of its prior determination regarding the method of recovery of the overpayment. By decision dated and finalized March 9, 1998, an Office hearing representative set aside the Office's May 27, 1997 decision and determined that the overpayment would be recovered by deducting \$350.00 from appellant's continuing compensation every 4 weeks.

In determining the method of recovery of an overpayment, the Office weighs the claimant's income assets and ordinary and necessary living expenses in a manner similar to the considerations used to evaluate whether waiver of an overpayment is necessary to avoid defeating the purpose of the Federal Employees Compensation Act.<sup>4</sup> The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act are set forth in section 10.322 of the Code of Federal Regulations. Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent, plus \$600.00 for each additional dependent).<sup>5</sup>

The Board finds that the Office improperly determined the method of repayment for appellant's overpayment.

Section 10.321 of Title 20 of the Code of Federal Regulations provides in pertinent part:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."<sup>6</sup>

In his March 9, 1998 decision, the Office hearing representative reduced appellant's overpayment recovery payments from \$700.00 every 4 weeks to \$350.00 every 4 weeks, but he

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<sup>4</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.4d(1) (September 1994).

<sup>5</sup> 20 C.F.R. § 10.322(a). Section 10.322 defines the terms "income," "expenses" and "assets." 20 C.F.R. § 10.322(b), (c) and (d). For waiver under the "defeat the purpose of the Act" standard, a claimant must show both that he needs substantially all of his current income to meet ordinary and necessary living expenses and that his assets do not exceed the applicable resource base; see *George E. Dabdoub*, 39 ECAB 929, 935-36 (1988); *Robert E. Wenholz*, 38 ECAB 311, 314 (1986). An individual is deemed to need substantially all of his current income to meet ordinary and necessary living expenses if his monthly income does not exceed monthly expenses by more than \$50.00; see Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6a(1) (September 1994); *Connie L. Potratz-Hasson*, 42 ECAB 359, 363 (1991); 20 C.F.R. § 10.323.

<sup>6</sup> 20 C.F.R. § 10.321(a); see *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

did not adequately explain his rationale for determining that appellant was able to make payments in this amount without defeating the purpose of the Act. The Office hearing representative acknowledged that the record reflected that appellant had approximately \$12,621.00 in annual family income (\$1,050.00 monthly income) and \$2,395.00 in monthly expenses. He noted that “[t]he balance between monthly income and expenses is not entirely tenable” but he did not adequately explain this assertion.<sup>7</sup>

The record does not show that, in requiring repayment of the overpayment by deducting \$350.00 from appellant’s compensation payments every 4 weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.321 in order to find that the method of recovery would minimize any resulting hardship on appellant. Therefore, the Office improperly required repayment of the overpayment by deducting \$350.00 from appellant’s compensation payments every 4 weeks. The case will be remanded to the Office for consideration of the appropriate factors regarding appellant’s ability to repay the overpayment to be followed by an appropriate decision.<sup>8</sup>

The decision of the Office of Workers’ Compensation Programs dated and finalized March 9, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.  
September 12, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Member

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<sup>7</sup> The record reflects the fact that appellant has amassed considerable debt.

<sup>8</sup> Consideration should be given to updated information regarding both appellant’s current monthly income and monthly expenses.